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# Public Prosecutor v Abdul Halim bin Abd Samat

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO T-06B(S)-65–10 OF 2013
RAUS SHARIF PCA, ABDUL MALIK ISHAK AND UMI KALTHUM JJCA
12 FEBRUARY 2014

*Criminal Procedure — Sentencing — Binding over — Whether binding over order appropriate when offence one of causing grievous bodily hurt with parang — Whether extenuating circumstances existed for accused to escape custodial sentence — Whether sentence must reflect gravity of offence and consider public interest to maintain law and order and public confidence in rule of law — Whether ordering accused to compensate victim monetarily not an appropriate direction in circumstances of case*

The sessions court had ordered the respondent ('the accused') to be bound over for three years under one surety in the sum of RM5,000 after he pleaded guilty to causing grievous bodily hurt to a man ('the victim') with a *parang* together with two others still at large. The court also ordered the accused to pay the victim RM12,000 in compensation. The victim rejected the compensation and the sum was paid into court. The High Court dismissed the appellant's appeal against inadequacy of the sentence, holding that the sessions court had taken all material factors into account including, inter alia, the fact the accused was a civil servant and a first offender; that he was 45 years old when the offence happened; that he had a heart ailment and suffered from hypertension and diabetes; and that the accused and the victim were related and the attack concerned a family feud. According to the prosecution's narrative, the accused and two others went to the victim's house and, while his wife and mother-in-law looked on helpless, attacked him with the *parang* causing the victim to suffer an open fracture, deep cuts to the muscles of his right forearm and multiple lacerations. In the instant appeal, the appellant submitted that the sentence of binding over was grossly inadequate given the gravity of the offence and the seriousness of the injuries suffered by the victim.

**Held**:

(1) On the facts, this was not a fit and proper case for the making of a binding over order under s 294 of the Criminal Procedure Code. The offence committed was grave in nature, it outweighed the mitigating factors advanced by the accused and there were no extenuating circumstances for the accused to escape custodial sentence. The fact the accused was a civil servant should not sway the courts into showing him leniency. The

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accused's conduct could not be condoned and it warranted a deterrent sentence to maintain law and order and public confidence in the rule of law and serve as a warning to other would-be offenders. To maintain the binding over order would be to put the interest of the accused above, and in total disregard to, public interest and that could not be right (see paras 12–13 & 17).

(2) Over-emphasis by the sessions court and by the High Court on appeal on the interest of the accused with total disregard to public interest was a misdirection in law meriting interference by this court. The views of the courts below did not reflect the seriousness of the offence and the public abhorrence for this type of criminal conduct. The sentence imposed must reflect the gravity of the offence. When a judge imposed a sentence he made a statement whether the offence was serious or trivial. In meting out sentences, judges must be cautious and weigh the balance between the gravity of the offence with the proposed sentence. The sentence must always reflect public interest after taking into account the accused's mitigation (see paras 10 & 17).

(3) The order for payment of compensation in this case could not redeem the pain and agony the victim and his family had endured. A mere payment of RM12,000 could not meet the ends of justice, especially when the victim as in this case had rejected the same resulting in the compensation sum being paid into court. The court must always evaluate to see whether on the facts and circumstances of a given case the making of such an order was appropriate (see para 16).

**[Bahasa Malaysia summary**

Mahkamah sesyen telah memerintahkan responden ('tertuduh') untuk terikat selama tiga tahun di bawah seorang penjamin dalam jumlah RM5,000 selepas dia memplid bersalah menyebabkan kecederaan yang parah terhadap seorang lelaki ('mangsa') dengan parang bersama-sama dengan dua orang lagi yang masih bebas. Mahkamah juga memerintahkan tertuduh membayar mangsa sebanyak RM12,000 sebagai pampasan. Mangsa menolak pampasan tersebut dan jumlah dibayar kepada mahkamah. Mahkamah Tinggi menolak rayuan perayu terhadap hukuman yang tidak mencukupi, memutuskan bahawa mahkamah sesyen telah mengambil kira kesemua faktor material termasuk, antara lain, fakta bahawa tertuduh adalah pegawai awam dan pesalah pertama; yang dia adalah berumur 45 tahun apabila kesalahan berlaku; bahawa dia mempunyai sakit jantung dan mengidap hipertensi dan kencing manis; dan bahawa tertuduh dan mangsa adalah bersaudara dan serangan adalah berkaitan pergaduhan keluarga. Mengikut naratif pihak pendakwaan, tertuduh dan dua orang lagi pergi ke rumah mangsa dan, sementara isteri dan ibu mertua melihat dengan tidak berdaya, menyerang mangsa dengan parang menyebabkan mangsa mengalami fraktur terbuka, luka dalam pada otot tangan kanannya dan beberapa luka lain. Dalam rayuan ini, perayu berhujah bahawa hukuman

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mengikat jamin adalah tidak mencukupi mengambil kira graviti kesalahan dan keseriusan kecederaan yang dialami oleh mangsa.

**Diputuskan**:

(1) Berdasarkan fakta, ini bukanlah kes yang betul dan wajar untuk membuat perintah mengikat jamin di bawah s 294 Kanun Tatacara Jenayah. Kesalahan yang dilakukan adalah bersifat serius, ia melebihi faktor peringanan yang dikemukakan oleh tertuduh dan tidak terdapat keadaan peringan untuk tertuduh melepaskan diri daripada hukuman tahanan. Fakta bahawa tertuduh adalah pegawai awam tidak patut mempengaruhi mahkamah untuk hukumannya diringankan. Kelakuan tertuduh tidak boleh dibiarkan dan mewajarkan hukuman tahanan untuk mengekalkan undang-undang dan ketenteraman dan keyakinan orang awam dalam peraturan undang-undang dan berfungsi sebagai peringatan kepada orang yang lain yang akan menjadi pesalah. Untuk mengekalkan perintah mengikat jamin seperti meletakkan kepentingan tertuduh, tanpa memperdulikan, kepentingan awam dan ini adalah salah (lihat perenggan 12–13 & 17).

(2) Penekanan oleh mahkamah sesyen dan oleh Mahkamah Tinggi atas rayuan atas kepentingan tertuduh tanpa mempedulikan kepentingan awam adalah salah arah di sisi undang-undang mewajarkan campur tangan oleh mahkamah ini. Pandangan mahkamah bawahan tidak mencerminkan keseriusan kesalahan dan perasaan benci awam untuk jenis kelakuan jenayah ini. Hukuman yang dikenakan mesti mencerminkan graviti kesalahan. Apabila hakim mengenakan hukuman beliau membuat pernyataan sama ada kesalahan adalah serius atau tidak teruk. Dalam memberikan hukuman, hakim-hakim mesti berhati-hati dan mengimbangi di antara graviti kesalahan dengan hukuman yang dicadangkan. Hukuman mesti selalu mencerminkan kepentingan awam selepas mengambil kira pengurangan hukuman tertuduh (lihat perenggan 10 & 17).

(3) Perintah untuk bayaran pampasan dalam kes ini tidak dapat menebus kesakitan dan penderitaan yang ditangung oleh mangsa dan keluarganya. Bayaran sebanyak RM12,000 tidak dapat memenuhi matlamat keadilan, terutamanya apabila mangsa seperti di dalam kes ini telah menolaknya mengakibatkan pampasan tersebut dibayar kepada mahkamah. Mahkamah harus selalu menilai untuk melihat sama ada atas fakta dan keadaan kes pembuatan perintah sedemikian adalah wajar (lihat perenggan 16). ]

**Notes**

For cases on binding over, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3984–3992.

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**Cases referred to**

*Lim Kim Poh v PP* [2000] 3 MLJ 411, HC (refd)
*Nor Afizal Azizan v PP* [2012] 6 MLJ 171; [2012] 6 CLJ 370, CA (refd)
*PP v Lee Meow Sim Jenny* [1993] 3 SLR 885 (refd)
*PP v Lim Guan Hock and PP v Boo Swee Kim* [1949] 15 MLJ 231 (refd)
*R v Inwood* (1974) 60 Cr App Rep 70, CA (refd)
*Sinnathurai Subramaniam v PP* [2011] 5 CLJ 56, CA (refd)

**Legislation referred to**

Criminal Procedure Code s 294
Penal Code ss 34, 326

**Appeal from:** Criminal Appeal No 42H(A)-01–11 of 2012 (High Court, Kuala Terengganu)

*Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*
*Sahadeva A Arunasalam (Saha & Assoc) for the respondent.*

**Raus Sharif PCA (delivering judgment of the court):**

**[1]** This is an appeal by the public prosecutor on inadequacy of sentence meted out against the respondent ('the accused'). The accused was charged with two others still at large before the Kuala Terengganu Sessions Court for an offence under s 326 of the Penal Code read together with s 34 of the same Code. The charge reads as follows:

> Bahawa kamu bersama-sama 2 orang yang masih bebas, pada 3.7.2011 jam lebih kurang 11.30 malam, bertempat di tempat letak kereta di kawasan rumah beralamat 306 Kampung Cegar Batang, Jalan Pasir Akar, dalam Daerah Besut, di dalam Negeri Terengganu Darul Iman, telah menyebabkan cedera parah keatas Mohd Khafilullah Bin Mat Ayub, No KP 760608-03-5263 dengan menggunakan sebilah parang. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 326 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan

**[2]** The accused pleaded guilty. On 23 October 2012 the sessions court directed him to be bound over under s 294 of the Criminal Procedure Code ('the CPC') for a period of three years with one surety in the sum of RM5,000. The sessions court also ordered the accused to pay compensation in the sum of RM12,000 to Mohd Khafilullah bin Mat Ayub ('the victim').

**[3]** The public prosecutor appealed to the High Court against the decision of the sessions court. The learned High Court judge dismissed the public prosecutor's appeal and affirmed the decision of the sessions court.

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**[4]** An appeal was further preferred by the public prosecutor to the Court of Appeal. We heard the appeal on 9 January 2014 and allowed the public prosecutor's appeal. We set aside the orders of the courts below and instead imposed a custodial sentence of imprisonment for ten years. We ordered that the sentence of imprisonment to run from the date of our order ie 9 January 2014. We also ordered the compensation sum of RM12,000 which was paid into court to be refunded to the accused.

THE FACTS

**[5]** To state briefly, the victim in this case was attacked by the accused and two other assailants at large with a sharp object ('parang') at his home in Kg Cegar Batang, Jalan Pasir Akar, Terengganu. On that fateful day the accused and two other assailants went to the victim's house in a car around 11.30pm. They drove into the victim's house compound, got down from their car, approached the victim and started attacking him mercilessly with the *parang*. The ordeal which lasted for about five minutes was witnessed by the victim's wife and his mother-in-law. As a result of the attack the victim sustained the following injuries as reported in the medical report (P3):

(a) a 10cm laceration wound over the right temporal area of the head;

(b) a 5cm x 1cm laceration wound over the right ear; and

(c) multiple lacerations over the right forearm and hand ranging from 2cm to 10cm. The most proximal wound at the right forearm was deep cutting the muscles and the ulna bone causing an open fracture.

**[6]** Before us, the learned deputy public prosecutor ('the DPP') submitted that the sentence of binding over under s 294 of the CPC as ordered by the learned sessions court judge and later affirmed by the High Court judge was manifestly inadequate. To this end the learned DPP pointed out that the courts below erred in fact and in law in failing to consider the gravity of the offence committed and the seriousness of the injury that was inflicted on the victim. In short, it was impressed upon us that the sentence of binding over under s 294 of the CPC was unsustainable on the given facts and circumstances of this case.

**[7]** Learned counsel acting for the accused submitted that this court should not readily interfere with the sentence imposed by the courts below. According to him the sentence meted out was reformative and rehabilitative in nature after taking into consideration all the factors. He further submitted that the sentence of binding over under s 294 of the CPC does not exonerate the accused from the offence he had committed. The case of *Nor Afizal Azizan v Public Prosecutor* [2012] 6 MLJ 171; [2012] 6 CLJ 370 was cited in support of his proposition.

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A THE FINDINGS

**[8]** The appeal before us centres on the inadequacy of the sentence imposed against the accused by the sessions court and later affirmed by the High Court. As stated earlier the main complaint of the learned DPP was that the sentence B of binding over under s 294 of the CPC was manifestly inadequate. Thus, the point to be considered in this instant appeal is whether this is a fit case to bind over the accused under s 294 of the CPC. The learned sessions court judge in deciding as she did took into consideration the following factors:

C (a) that the accused was 45 years old at the time of the commission of the offence and he was a first offender;

(b) that the accused was a civil servant;

(c) that the accused was suffering from heart ailment with high blood D pressure as well as diabetes; and

(d) that the victim and the accused are related and they were involved in a long standing family feud and there were some sort of previous enmity between the accused, the victim and the victim's family.

E

**[9]** The learned High Court judge in affirming the sentence imposed by the learned sessions court judge gave the following reasons:

> Saya telah mendapati bahawa kesemua faktor yang diambil kira oleh HMS merupakan faktor yang material, yang perlu ditimbang oleh mana-mana F mahkamah sebelum menjatuhkan suatu hukuman. Saya seterusnya mendapati bahawa faktor-faktor tersebut terjumlah kepada faktor peringanan sebagimana diperuntukkan di bawah s 294 KTJ dan ditekankan dalam kes *Yeong Yin Choy*. Walaupun, kesemua faktor berikut lebih memihak kepada responden, namun saya berpendapat HMS juga turut mengambil kira prinsip keadilan yakni menimbang G keadaan pengadu yang telah cedera dan telah memerintahkan responden membayar pampasan sebanyak RM12,000 kepada pengadu. Selain itu juga, saya bersetuju dengan alasan HMS bahawa faktor kepentingan awam bukan hanya akan terjaga seandainya responden dikenakan hukuman penjara bahkan juga dalam keadaan di mana responden diletakkan di bawah bon, di mana responden harus mematuhi syarat-syarat tertentu dan berkelakuan baik sepanjang tempoh bon. Tiga H tahun adalah lama dan cukup untuk mencegah responden dari mengulangi kesalahan yang sama atau melakukan kesalahan selainnya dan ini secara tidak langsung mengimbangi kadar jenayah daripada terus berleluasa seiring dengan kepentingan awam.

I **[10]** It appears that the learned High Court judge stood guided by the principle that an appellate court should not readily interfere with the sentence imposed by the trial court. Whilst we agree that it is a guiding principle, we must not lose sight of the fact that the sentence imposed must also reflect the gravity of the offence. When a judge imposes a sentence, he is making a

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statement whether the offence is serious or trivial. It is in this context that judges in meting out sentences must be very cautious and must weigh the balance between the gravity of the offence with the proposed sentence. The sentence imposed must always reflect public interest after taking into account the mitigation advanced by the accused (see *Sinnathurai Subramaniam v Public Prosecutor* [2011] 5 CLJ 56).

**[11]** As judges, we must always remind ourselves that the fundamental role of a judge in a criminal justice system is to ensure that the measure of punishment should be proportionate to the offence committed. In the instant case, the undisputed facts clearly showed that the accused had come to the victim's house with two other persons on that fateful day armed with a *parang* to attack the victim. There was no evidence as to the sudden fracas between the victim and the accused. There was also no evidence to show that the victim had used any weapon against the accused in defending himself. Thus, evaluating the facts as a whole, there is only one conclusion that could be arrived at, ie that the accused had acted excessively in attacking the victim repeatedly with a *parang* causing grievous injuries to the victim. The victim was helpless. His loved ones stood as witnesses to this whole incident.

**[12]** On those facts, we are of the view that this is not a fit and proper case to grant mercy upon the accused by making an order under s 294 of the CPC. The offence that was committed by the accused is grave in nature that it outweighs the mitigating factors which have been advanced in his favour. The fact that the accused was a civil servant should not in our view sway the courts in showing leniency towards the accused. Thus, the conduct of the accused in all the circumstances of the case cannot be condoned and it warrants a deterrent sentence in order to maintain law and order and public confidence in the rule of law. A person who commits a serious offence must be punished severely.

**[13]** Learned counsel for the accused had urged this court to maintain the binding over order imposed by the courts below. With respect, if we were to accede to his request, the public will think that the court is putting the interest of criminals above the interest of the public. That cannot be right. As stated earlier this type of criminal conduct must be dealt with severely by the courts if it is to serve as a warning to other would be offenders. In our judgment, the element of public interest may be best served through the imposition of a custodial sentence given the gravity and other factors surrounding the wrongful act complained of. Surely, causing grievous hurt to a defenceless fellow human being, as in this case, attracts severe punishment under the law.

**[14]** In his submissions, learned counsel placed great reliance on the case of *Nor Afizal Azizan v Public Prosecutor* to say that s 294 of the CPC is punitive in effect and amounts to a form of punishment being inflicted on the offender.

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We find that learned counsel's reliance on the case of *Nor Afizal Azizan v Public Prosecutor* is misplaced. We say this because although we cannot deny the fact that an order under s 294 of the CPC is in fact punitive in nature we must not lose sight of the fact that each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any of the matters mentioned in s 294 of the CPC, binding over in all the circumstances of the case is expedient, (see *Public Prosecutor v Lim Guan Hock Public Prosecutor v Boo Swee Kim* [1949] 15 MLJ 231; and *Lim Kim Poh v Public Prosecutor* [2000] 3 MLJ 411). It must be recognised that no two cases are alike, and that the facts must necessarily vary from case to case. At the end of the day, each case has to be decided on its own merits.

**[15]** Another point which merits consideration is whether the order given by the learned sessions court judge to compensate the victim was appropriate in the circumstances. The learned DPP argued that an order of compensation does not amount to a sentence being passed and neither is it suitable considering the circumstances of this case. The learned DPP espoused his contention by referring to the cases of *Public Prosecutor v Lee Meow Sim Jenny* [1993] 3 SLR 885; and *R v Inwood* (1974) 60 Cr App Rep 70. This seems to be a preferable view and we have no reason to disagree with the learned DPP on this point. We are of the view that the power of the court to award compensation is not ancillary to other sentences but it is in addition thereto. It is a measure of responding appropriately to crime as well as to reconciling the victim with the offender.

**[16]** Although an order for payment of compensation to a victim is indeed a constructive approach to a crime as provided under our criminal jurisprudence, the court must always evaluate to see whether based on the facts and circumstances surrounding the case, such an order is appropriate. In our judgment, we find that an order for the payment of compensation as was done in this case will not redeem the pain and agony endured by the victim and his family. A mere payment of RM12,000 as compensation in our view will not be able to meet the ends of justice. This is especially so when the victim has rejected the offer resulting in the compensation sum of RM12,000 being paid into court.

**[17]** To reiterate our views aforesaid, we would like to emphasise here that the offence committed by the accused was not trivial and there were no extenuating circumstances in the commission of this offence for the accused to escape custodial sentence. In our view the binding over order imposed by the learned sessions court judge which was later affirmed by the High Court is not reflective of the seriousness of the offence and the public abhorrence for this type of criminal conduct. Over emphasis by the learned sessions court judge

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and later the learned High Court judge on the interest of the accused and total disregard to public interest is a misdirection in law which merits interference by this court.

**[18]** Thus, having regard to the facts, the circumstances and giving public interest the weight it deserves we allowed the learned DPP's appeal. The binding over under s 294 of the CPC and order for payment of compensation of RM12,000 as ordered by the learned sessions court judge and later affirmed by the High Court was therefore set aside. We substituted it with the sentence of ten years imprisonment to take effect from the date of our order ie 9 January 2014. We also ordered that the compensation paid into court is to be reimbursed to the accused forthwith.

*Order accordingly.*

Reported by Ashok Kumar